GOODMAN
Law Offices of Jack N. Goodman
jack@jackngoodman.com
O: 202-776-2045
M: 202-251-7507
F: 202-296-2014

November 8, 2017

***Ex Parte* Communication Filed by ECFS**

The Honorable Ajit V. Pai
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *2014 Quadrennial Review of the Commission's Broadcast Ownership Rules*, MB Docket No. 14-50
Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard, GN Docket No. 16-42

Dear Mr. Chairman:

On behalf of the Independent Television Group ("ITG"), these comments are submitted with respect to the draft Orders in the above-referenced proceedings.

ITG is an unincorporated organization of privately owned television stations in small and medium-sized television markets across the United States.[1] Many of ITG's members are family-owned companies which have provided service to their communities for generations. ITG grew out of a similar organization of privately-held newspaper companies, and the values of community service and quality journalism that have characterized smaller newspapers in the United States are equally important to the television stations operated by ITG's members.

ITG strongly supports the actions the Commission proposes to take on November 16 with respect to both the FCC's badly outdated broadcast ownership rules and to authorize a new transmission

[1] ITG's membership includes California Oregon Broadcasting, Inc., Cordillera Communications, Cowles Company, Forum Communications, Frontier Broadcast Holdings LLC, Griffin Communications, LLC, Heartland Media, LLC, Heritage Broadcasting of Michigan, Holston Valley Broadcasting, KTBS, LLC, Lilly Broadcasting, LLC, Manship Media, Morgan Murphy Media, Morris Multimedia, Inc., News Press & Gazette Company, Northwest Broadcasting, Inc., Quincy Media, Inc., Ramar Communications, Sarkes Tarzian, Inc., and Woods Communications Corporation.

system for American television. ITG is concerned, however, that some of the choices the Commission proposes to make may unintentionally disadvantage stations in small and medium markets, which the Commission has recognized already face greater obstacles than stations serving larger markets. ITG asks you to consider two changes, one to each proposed decision.

The Challenges Facing Small and Medium Market Television Stations Are Well-Established

As the draft Ownership Order recognizes, "small markets [are] where cross-ownership may be needed most to sustain local news outlets."[2] The same is true with respect to same-service ownership rules. Although certain costs such as real estate and salaries may be marginally lower in small and medium markets, other costs are the same. Transmitters, antennas, cameras, master control systems, ENG systems, editing equipment, and billing and accounting systems are not sold at discount in smaller markets. And since many small and medium-sized markets are geographically large, they face additional costs of running satellite and translator stations or of transmitting their signals to distant MVPDs that are generally not required of stations in markets with larger populations.

Yet, while many of the costs of operating a television station in a small or medium market are not much less than in a large market, market revenues in large television markets dwarf the revenues in small and medium markets. The total advertising base in those markets is much less, and even if they can negotiate per-subscriber retransmission consent fees similar to those of stations in larger markets (which frequently is not the case), the much smaller number of MVPD subscribers results in much less revenue than larger market stations receive.[3]

Notably, while previous reviews of ownership rules have afforded stations in larger markets opportunities to obtain the efficiencies of owning two stations, the eight-voice and top-four restrictions on television duopolies have effectively kept small and medium market stations out of the game. And while the Commission has permitted waivers for failing stations in smaller

[2] Proposed Order on Reconsideration, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, attached to *FCC Fact Sheet*, rel. Oct. 26, 2017 ¶ 41 (hereinafter *Proposed Ownership Order*).

[3] Evidence in the record shows that in markets 1-10, the average revenue per station in 2013 was $45,502,000. The average revenue per station in the next ten markets was less than half that amount; the average per-station revenue in markets 51-100 was only $8,313,000, in markets 101-50, $5,228,000, and in markets 151-210, $3,208,000. Comments of the National Association of Broadcasters, MB Docket No. 14-50 (filed Aug. 6, 2014), Appendix D (hereinafter *NAB 2014 Comments*). Thus, average station revenues in the smallest markets was only 7.5 percent of the average of a top-ten market station. And since the largest markets include commercial stations not affiliated with the large broadcast networks, the actual discrepancy in station revenues for the network affiliates that typically provide local news programming is even greater.

markets,[4] the failing station waiver standard was limited to stations with very low viewing shares, and in effect also barred common ownership among top-four stations.[5]

Some relief from the adverse impact of the duopoly rule in small and medium markets was afforded by the Commission's approval of same-market Joint Sales and Shared Services agreements, which allowed stations to gain some of the efficiencies of common operation. Indeed, in the *Proposed Ownership Order*, the Commission recognizes that "the record is replete with evidence that television JSAs create efficiencies that benefit local broadcasters—particularly in small- and medium-sized markets—and enable these stations to better serve their communities."[6]

ITG also supports the FCC's proposed decision to return the attribution status of television JSAs to where it was before 2014, and thus to permit stations to negotiate mutually beneficial agreements that preserve or enhance service to viewers. Yet giving stations in small and medium markets only the option of entering into joint services and shared services agreements, rather than direct ownership of other stations in their markets, imposes higher costs in the markets least able to support them. Joint sales and shared services agreements are complex and require far more in legal and management resources to negotiate and implement than do straight station acquisitions. They typically involve financial guarantees for the partner station's loan, and the costs of compensation to the partner station's licensee, of providing benefits to its employees, and of separately negotiating retransmission consent agreements all make such arrangements less efficient than would be direct acquisition of another station. Thus, limiting small and medium market stations to these less formal arrangements further condemns them to less efficient operations than stations in larger markets.

The Commission Should Eliminate or Modify the Top-Four Station Prohibition

ITG agrees that the time has long passed for the Commission to bring its broadcast ownership rules – all of which in their application to small and medium markets date to an era when there were only three national broadcast networks, cable systems were limited to retransmission of local signals in rural areas, and there was no internet – to reflect contemporary conditions. Thus, the Commission will be well-justified in repealing cross-ownership rules barring common ownership of broadcast stations and newspapers and limiting common ownership of radio and television stations. These rules which apply to no other medium of communications needlessly have restricted efficient operation and news production, efficiencies which are particularly needed in smaller markets where revenues are inherently more limited.[7] Further, because

[4] 47 CFR § 73.3555 note 7.

[5] *See NAB 2014 Comments* at 59.

[6] *Proposed Ownership Order* ¶ 108; *see, e.g., Ex Parte* Letter from Jack N. Goodman to Marlene H. Dortch, MB Docket 04-256 (filed Feb. 26, 2014)(describing public interest benefits from JSAs in Wichita, Kansas, Springfield, Missouri and Augusta, Georgia).

[7] A former member of ITG was required to divest a radio station when it sought to acquire a television station in the same market even though the transaction would not have resulted in any

existing "grandfathered" combinations could not up to now be assigned to one new owner, they made planning for the future for family-owned media companies much more difficult.

Similarly, ITG applauds the Commission's proposed decision to repeal the rule requiring eight independent television voices as a condition on common ownership of two television stations in a market. That change, however, will offer little flexibility to stations in small and medium markets where, as discussed above, the need for greater operating efficiencies are greatest. That is because in 79 television markets, there are only four or fewer commercial television stations, and thus the only possible in-market combinations are among the top-four stations. In 33 additional markets, there are only five commercial stations.[8] Some of those are not interested or appropriate for common ownership with another station and, even in the markets where there is a fifth commercial station where common ownership could increase service to the public, that opportunity would exist for only one top-four station.

The Commission rests its decision to retain the top-four prohibition on what it believes is record evidence of a common ratings gap between top-four and other stations.[9] While the Commission acknowledges record evidence that in many markets, there is an equivalent or larger ratings gap between "second and third-ranked stations in some markets"[10] and the top-four restriction is thus over-inclusive, it proposes to keep it in place.[11]

Instead, the Commission proposes to apply it flexibly by offering the potential for a case-by-case exception in particular markets. Case-by-case waivers of ownership rules are in general problematical since their application is uncertain and inherently result in longer regulatory delays than application of bright-line rules. They also impose higher costs to develop and submit evidence and expert analyses to support exceptions. Those costs and delays weigh higher on small and medium market stations, particularly if they are required to keep financial

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loss in the number of diverse voices in the market and would have resulted in the introduction of agricultural news programming in a rural area. The new owner of that radio station did not have the news or economic resources to offer similar programming.

[8] These calculations exclude full-power satellite stations.

[9] *Proposed Ownership Order* ¶ 79 & n.230.

[10] *Id.* ¶ 79.

[11] Evidence in the record demonstrates, however, that there are frequently large revenue "breaks" among top-four rated stations, and thus the assumption that top-four stations even typically have similar revenues is inaccurate. *See NAB 2014 Comments* at 52-53 (Of the 140 markets with four full-power commercial television stations, in 69, the all-day audience share of the third and fourth-rated stations *together* is less than that of the top-rated station, and in 46 of these markets, the top-rated station's revenue share is at least ten percent greater than the second-rated station). The Commission's assumption that commonly-owned stations have reduced incentive to compete for viewers and advertisers also has no support in the record or in the experience of ITG's members.

commitments open for extended periods of time while the Commission considers an assignment application.

ITG further observes that many of the criteria the Commission proposes to use in evaluating requests for exceptions to the top-four prohibition inherently favor granting exceptions in larger markets where the need for flexibility is less. The two first criteria – ratings and revenue share of the stations proposed to be combined compared with other stations in the market[12] – is much more likely to be met in larger markets where there are more stations than in a market where there are only four or fewer stations. Further, as with the failing station waiver criteria, in a market where there are only four or fewer commercial stations, they will almost certainly be affiliates of the large national broadcast networks and the network programming alone will result in significant ratings for each station.[13]

ITG is also concerned that the third criterion, which asks for information about "market characteristics, such as population and the number and types of broadcast television stations serving the market," will also be interpreted as favoring combinations in larger markets with more television stations and other video providers, and disfavoring combinations in small and medium markets.

Thus, ITG asks the Commission, before it adopts the proposed ownership rules, to consider eliminating the top-four restriction in small and medium markets. Even if the Commission leaves the restriction in place, ITG believes that it should establish a presumption in favor of in-market combinations in small and medium markets unless there are transaction-specific reasons to believe the proposed combination would be anti-competitive. And in particular, the Commission should adopt a presumption in favor of permitting common ownership of stations in small and medium markets where the stations involved or other stations in the same market have operated under joint sales and shared services agreements (or grandfathered local marketing agreements) and there has been no evidence of reduction of service or other adverse public interest effects.

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[12] *Proposed Ownership Order* ¶ 82.

[13] In the revenue share analysis, the Commission proposes to include a comparison of retransmission consent fees. Almost all retransmission consent agreements, however, bar disclosure of their terms including the amount of compensation. Thus, stations in a market are barred from sharing that information with their competitors, making it impossible to provide the information the Commission anticipates receiving. While reports from publicly-traded companies are often used to estimate retransmission fee levels, those companies mostly operate stations in larger markets and the fees they receive may not reflect fees paid stations in smaller markets. And even those reports would not provide the kind of market-specific data the *Proposed Ownership Order* appears to contemplate.

Next Generation Television

ITG also applauds the Commission's proposed endorsement of the ATSC 3.0 standard and the steps it will take to allow the broadcast television industry to adopt new technology in a way that provides new services while protecting viewers of current digital channels. ITG's concern is limited to carriage obligations for Next Gen signals, which ITG believes will delay viewers in small and medium markets from receiving the benefits of this advanced technology.

In the *Proposed Next Gen Order*, the Commission took a middle position on carriage of ATSC 3.0 signals on Mutli-Channel Video Program Distributors (MVPDs). On the one hand, it proposes to reject MVPD requests that any discussion of retransmitting ATSC 3.0 signals be excluded from retransmission consent negotiations. That is entirely correct since both the Communications Act and the Commission's decisions implementing retransmission consent make clear that marketplace negotiations should govern discussions between stations and MVPDs; excluding subjects from those discussions would be inconsistent with Congress' intent.

On the other hand, the Commission proposes to bar stations broadcasting in ATSC 3.0 from electing must carry, even if they do not broadcast in ATSC 1.0.[14] ITG is afraid that, by barring any mandatory carriage of ATSC 3.0 signals, the Commission will frustrate and delay adoption and development of Next Gen television in small and medium markets.

Stations in those markets, particularly those owned by smaller companies such as ITG's members, already face disadvantages in negotiating retransmission consent agreements with MVPDs, many of which are large national companies. Failing to reach a carriage agreement in a small market may have little effect on a large MVPD since even the potential loss of some subscribers in s small or medium market would not have a substantial adverse impact on the MVPD's subscriber totals or revenues. Loss of distribution to a large part of their market, on the other hand, can be devastating to small and medium market television stations, particularly where they are not part of a large ownership group. Thus, ITG members are disadvantaged in retransmission consent negotiations.

While larger market stations or stations in large ownership groups may be able to use the retransmission consent process to compel carriage of ATSC 3.0 signals, that may not prove the case in smaller markets where stations have less leverage. Stations in those markets will thus have greater difficulty in recouping investment in Next Gen Television and thus may delay implementing the new standard. The result will be that viewers in those markets may be deprived of benefits that are available in larger markets, contrary to the Commission's statutory mandate to promote a "Nation-wide" communications service.[15]

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[14] Proposed Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 16-142, attached to Fact Sheet rel. Oct. 26, 2017 ¶¶ 65-66 (hereinafter *Proposed Next Gen Order*).

[15] 47 USC § 151.

ITG further notes that in proposing that MVPDs will not be obligated to retransmit ATSC 3.0 signals, the Commission relies on its similar decision denying must-carry rights to digital signals prior to the digital transition.[16] The Commission, however, does not acknowledge that it failed to address a request to reconsider that decision which argued that the plain language of the Communications Act requires cable systems to carry "the signals of local commercial television stations," a definition which does not distinguish one type of signal from another.[17] Further, a "local commercial television station" is defined in the Act as "any full power broadcast television station . . . licensed and operating on a channel regularly assigned to its community by the Commission."[18] That definition is also not limited to any particular technology, nor to one program stream broadcast by a licensed station.

The Petition for Reconsideration filed by NAB and MSTV was voluntarily withdrawn in 2015 "[d]ue to the passage of time."[19] In the Order dismissing it, the Commission acknowledged that "we are dismissing these petitions without prejudice."[20] Thus, contrary to the Commission's proposed decision, the issue of whether the Act requires carriage of any signal broadcast by a local commercial television station remains open.

ITG believes that, since the *Proposed Next Gen Order* is intended only to start the transition to a new broadcast transmission system, the Commission need not resolve the question of whether ATSC 3.0 signals can have must-carry rights at this time. Given the potential disadvantage to viewers in small and medium markets of denying stations even the option of mandatory carriage rights for Next Generation signals, ITG suggests that the Commission defer a decision on carriage rights until Next Gen broadcasts and television sets capable of receiving them are beginning to be available to consumers.

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[16] *Id.* ¶ 66.

[17] *Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc.*, CS Docket No. 98-120 (filed Apr. 21, 2005). For the Commission's convenience, a copy of that Petition is attached to this letter.

[18] 47 USC § 534(h)(1)(A).

[19] *Order of Dismissal,* CS Docket No. 98-120 (rel. Sept. 29, 2015).

[20] *Id.* ¶ 2.

Conclusion

ITG reiterates its applause for the Commission's proposals to address both long-delayed reforms in its ownership rules and the need to advance to new television technology. It asks the Commission to consider two changes to the proposed orders that would, as drafted, disadvantage stations in small and medium markets.

Respectfully submitted,

Jack N. Goodman
Counsel to the Independent Television Group

cc (by e-mail):
The Honorable Mignon Clyburn
The Honorable Michael O'Rielly
The Honorable Brendan Carr
The Honorable Jessica Rosenworcel
Matthew Berry
Michelle Cary
Alison Nemeth
David Grossman
Brooke Ericson
Nirali Patel
Kate Black

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast	)	CS Docket No. 98-120
Signals: Amendments to Part 76	)	
of the Commission's Rules	)	
	)	

PETITION FOR RECONSIDERATION OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.
P.O. Box 9897
4100 Wisconsin Avenue, NW
Washington, DC 20016
(202) 966-1956

David L. Donovan

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Marsha J. MacBride
Jerianne Timmerman

April 21, 2005

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EXECUTIVE SUMMARY

The National Association of Broadcasters and the Association for Maximum Service Television, Inc. petition for reconsideration of the two decisions the Commission made in its *Second Report and Order* on digital carriage issues. In denying must carry rights for local commercial digital signals during the transition and for multicast programming both then and when the digital transition is completed, the Commission committed fundamental error:

- In two decisions, the Commission failed to explain why the plain language of Section 614, which requires carriage of ***all signals*** of local commercial television stations, does not mandate carriage of local commercial digital signals during the transition. The statutory language is not ambiguous and the Commission cannot depart from the specific mandate of its governing statute.

- While now recognizing that the 1992 Cable Television Consumer Protection and Competition Act does not, as the Commission once believed, limit digital carriage to one programming stream, the Commission failed to interpret the Act to achieve in digital the objectives Congress set out for analog signals. The Act requires carriage in analog of all portions of a local broadcast signal that are accessible for free and without special equipment. The Commission must impose the same distinction in digital carriage rules: non-subscription digital programming must be carried; subscription streams may be stripped.

- The Commission made a fundamental error in applying the *Turner Broadcasting* test: it converted intermediate scrutiny to strict by demanding proof that digital carriage rules are "necessary" or "essential" to achieving the governmental interests behind must carry; the Supreme Court only demands that carriage rules "promote" those interests.

- The Commission held that both transitional and multicast carriage rules would improperly "burden" cable speech rights, but it never even looked at the evidence it collected about cable capacity. That unrefuted evidence shows the vast expansion of cable capacity since analog must carry went into effect and the ability of cable systems to now ***carry two digital signals in the space needed for one analog signal***. Carriage of all local digital signals would not, therefore, have any material impact on cable speech. Without a burden on speech, digital carriage rules would not even be subject to a First Amendment question.

- The Commission stated that the record did not support broadcasters' claims that carriage of digital signals during the transition and multicast carriage would advance Congress' interests in requiring must carry. The Commission misunderstood those interests since Congress' goal was to strengthen local broadcasting, not just prevent its disappearance.

- Finally, the Commission's conclusions must also be reconsidered because in fact there is a mountain of evidence in the record demonstrating that transitional and multicast carriage would substantially strengthen local broadcasting service, adding to the diversity of information services available to consumers and hastening the digital transition. The failure to even acknowledge the existence of this evidence is a fatal error for the Commission cannot, as it purported to, weigh the burden and benefits of digital must carry rules when it fails to consider the evidence on one side of the scale.

Each of these errors, standing alone, requires reconsideration. If, as we contend, the statute ***requires*** carriage of the full digital signals of local commercial stations, then there was no need for the Commission to even consider the constitutionality of those rules. But even if the statute left some room for discretion (which it did not), then the Commission cannot judge digital carriage rules under a strict scrutiny standard when the Supreme Court says that, at most, intermediate scrutiny is appropriate. Moreover, given the absence of any material impact on cable speech opportunities because of the increase in cable capacity, there could be no First Amendment violation. Finally, even if it were appropriate for the Commission to have weighed the burdens and benefits of digital carriage rules under *Turner*, it could only do so after it examined the substantial record evidence demonstrating the benefits of must carry.

For these reasons, the National Association of Broadcasters and the Association for Maximum Service Television, Inc. ask the Commission to reconsider and to require cable systems to carry all free portions of the digital signals of local commercial television stations.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast	)	CS Docket No. 98-120
Signals: Amendments to Part 76	)	
of the Commission's Rules	)	

PETITION FOR RECONSIDERATION OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television, Inc. ("MSTV")[1] respectfully petition for reconsideration of the two issues resolved in the Commission's *Second Report and Order* in this proceeding.[2] In the *Second Report and Order*, the Commission erroneously concluded that there is no requirement under the Cable Act[3] for cable systems to either (i) carry both the analog and digital signals of local commercial television stations during the digital transition ("dual" or "transitional" carriage) or (ii) carry multicast programming even after the transition is completed.

This petition addresses legal and factual issues that the Commission has either decided for the first time in the *Second Report and Order* or that the Commission has never addressed at

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[1] NAB is a non-profit, incorporated association of radio and television stations. NAB serves and represents the American broadcasting industry. MSTV represents over 500 local television stations on technical issues relating to analog and digital television services.

[2] Second Report and Order and First Order on Reconsideration, *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) (hereinafter *Second Report and Order*).

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (hereinafter Cable Act).

all. The Commission and the courts have recognized both situations as compelling circumstances for reconsideration by an agency.[4]

The Commission's decisions were infected by three principal legal errors — each of which is an independent ground for reversal on appeal and compels reconsideration. First, the Commission misinterpreted the Cable Act, which provides for carriage rights for both analog and digital signals of local commercial television stations for both transitional carriage and multicasting. In the structure and language of the Act, Congress made plain its intent that all non-subscription programming on local commercial television stations must be transmitted by cable systems. In the absence of further guidance from Congress, the Commission was not free to eliminate a carriage duty through its "gap filling" role under *Chevron*.[5] This is a classic case for reconsideration because (i) with respect to transitional carriage, the Commission has still not yet offered any statutory reasoning supporting its decision and (ii) with respect to multicasting, the FCC changed its mind, presenting a brand-new legal analysis for reconsideration.

Second, even if the Commission were properly authorized to eliminate the statutory carriage rights of broadcasters (which it is not), the agency erroneously concluded that it would have been constitutionally forbidden from ensuring digital carriage. In its *Turner* analysis, the Commission used the wrong constitutional standard of review. By assessing whether statutory

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[4] *See* 47 C.F.R. § 1.429(i) ("[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order"); *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997) (an order on reconsideration that "reopens a matter" is reviewable on the merits even if an agency "merely reaffirms its original decision"); Memorandum Opinion and Order, *MTS and WATS Market Structure*, 99 F.C.C.2d 708 ¶ 6 (1984) (no requirement that a second petition for reconsideration be denied); *Western Union Corp. v. FCC*, 856 F.2d 315, 319 (D.C. Cir. 1988) (reconsideration appropriate where agency wrongly "asserts that the issue has been decided"). *See also North Am. Telecomms. Ass'n v. FCC*, 772 F.2d 1282, 1286 (7th Cir. 1985) (citing 47 C.F.R. § 1.429(b)(3)) ("Commission [may] reconsider its decision de novo" if it would serve the public interest even if "no new material is presented").

[5] *Chevron U.S.A., Inc. v. National Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

carriage rights were "necessary" or "essential" to achieve a governmental interest, the Commission converted what should have been intermediate scrutiny under the *Turner* cases[6] into strict scrutiny. The Commission also failed to recognize that the core premise of *Turner* — that must carry obligations could materially burden cable speech — no longer applied. There was unrefuted record evidence — also bypassed by the Commission — of such enormous growth in cable capacity that digital carriage rules would not have any material effect on cable speech. That fact alone eliminated any argument that there was an unconstitutional burden on speech. Both issues are before the Commission for the first time on reconsideration.

Third, the Commission failed to acknowledge or deal with entire categories of record evidence demonstrating concrete benefits from multicasting. Those benefits reflect many of the core principles that both Congress and this Commission have long espoused — promoting diversity of programming, local news and information, children's and other educational programming, programming for non-English speaking and other minority communities. On top of all that, multicasting is important to the preservation of the financial health of the local broadcasting system (especially in small and medium-sized markets), and will help bring emerging networks (like UPN and WB) to communities not otherwise reached by them over the air.

I. THE COMMISSION ERRED IN ITS STATUTORY ANALYSIS OF THE CABLE ACT.

In its statutory analysis in the *Second Report and Order*, the Commission erred twice when it concluded that (i) the Cable Act "is ambiguous on the issue of dual carriage," (¶ 13) and (ii) with respect to multicasting, that although "the language of the Act may be less definitive

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[6] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (hereinafter *Turner I*); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (hereinafter *Turner II*) (collectively, the "*Turner* cases").

than portions of our earlier decision suggested," cable systems are not required to transmit multicast programming of local stations. (¶ 33) Both conclusions are incorrect. The Commission is bound under the familiar principles of *Chevron*[7] to adhere to the language and legislative history of the Cable Act, which mandate must carry rights for the non-subscription content of the digital signals of local commercial television stations. For that reason, the Commission's decisions on both the transitional carriage issue (Part I.A below) as well as multicasting (Part I.B below) were wrong.

A. The Plain Language of Section 614 Requires Carriage of Analog and Digital Television Signals, and the Commission Never Explained Why It Does Not.

The Commission has now twice — both in the *First Report and Order*[8] and once again in the *Second Report and Order* — failed to provide a legal analysis of the Cable Act with respect to transitional carriage of both analog and digital broadcasting. The Commission engaged in the ultimate regulatory "shell game" by contending in the *Second Report and Order* that it already "considered" this legal issue and "rejected" the arguments of NAB and MSTV in the *First Report and Order.*[9] Yet an examination of the *First Report and Order* reveals no statutory reasoning whatsoever to support the denial of transitional carriage. While the Commission explained why it rejected cable's argument that Section 614 *precludes* the carriage of digital

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[7] *See Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

[8] First Report and Order and Further Notice of Proposed Rulemaking, *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 (2001) (hereinafter *First Report and Order*).

[9] *Second Report and Order* ¶ 13; *see AT&T Co. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992) ("the Commission had an obligation to answer the questions [a petition] raised" and not engage in a regulatory "shell game").

signals during the transition,[10] it failed to provide ***any*** reasoning as to why it did not accept broadcasters' argument that that provision ***requires*** carriage of both the digital and analog signals during the transition.[11] The Commission's bare assertions are no substitute for reasoned decision-making.

It is hornbook law, and surely the basis for a remand, that an agency must supply its reasoning.[12] Without that reasoning, a reviewing court will have no basis to test the agency's conclusions for legal sufficiency. It is no answer to contend, as the *Second Report and Order* does, that NAB, MSTV and others previously argued their position on the statute before the *First Report and Order* and once again in their petition for reconsideration. (¶ 13) Of course they did. But that has nothing to do with the Commission's obligation under the Administrative Procedures Act to confront these statutory arguments and provide its reasoning.[13]

In extensive pleadings, the broadcasters pointed out the following:

- Section 614(a), which requires cable operators to carry "the signals of local commercial television stations," makes no distinction between analog and digital signals;

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[10] *First Report and Order* ¶¶ 15-16 (noting that "section 614(a), which imposes carriage obligations on cable systems, does not distinguish between digital and analog signals," and concluding that since "Congress has spoken to the issue of digital broadcast signal carriage in Section 614(b)(4)(B), and given such carriage is not barred under another statutory provision, digital broadcast signal carriage fits within the express requirement of section 614(a)").

[11] *Id.* ¶ 14 (stating that "[w]e do not accept the arguments of . . . those commenters . . . who argue that the statute compels dual carriage," but failing to say why).

[12] *See, e.g., Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986) (noting "responsibility of the agency to explain the rationale and factual basis for its decision"); *see Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotation marks omitted).

[13] *See* 5 U.S.C. § 553(c) ("[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules a concise general statement of their basis and purpose").

- Section 614(b)(5), which allows cable operators to deny carriage of duplicating signals, applies only to signals of one local commercial television station "that substantially duplicates the signal of *another* local commercial television station" (emphasis added), and, therefore, does not apply to carriage of two signals of the *same* local station;

- The definition of a "local commercial television station" in Section 614(h)(1)(A) includes "any full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission," and neither makes any distinction between analog and digital operations nor suggests that a station is limited to one signal; and

- The directive in Section 614(b)(4)(B) to the Commission to make "any changes in the signal carriage requirements of cable television systems necessary to ensure carriage" of "advanced television" signals shows that Congress adopted the broad statutory directive that all signals be carried in full contemplation that stations would be broadcasting two signals.

In the face of these statutory arguments, the Commission has not explained why the Cable Act does not mandate carriage of local commercial digital signals. The Commission should therefore reconsider its decision that Section 614 does not demand that both analog and digital signals of local commercial stations be entitled to carriage during the transition.

B. The Act Requires Carriage of All Non-Subscription Portions of a DTV Signal.

The Commission in the *Second Report and Order* did reverse its earlier conclusion that the Cable Act required carriage of only one programming stream in a digital signal. The Commission now takes the position that the statutory language is ambiguous and allows it to decide whether portions of a broadcast digital signal may be stripped by cable systems. *Second Report and Order* ¶¶ 33-34. In light of the statutory directive by Congress in the Cable Act that all universally available free content be carried, the Commission should reconsider this position and conclude that the Cable Act requires carriage of all non-subscription programming streams in a digital television signal.

Section 614(b)(3) provides that cable operators must carry "the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial

television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers." 47 U.S.C. § 534(b)(3). The Commission properly recognized that this language does "not directly translate to digital technology." *Second Report and Order* ¶ 34. But that does not mean that the Commission has unbridled discretion to determine any meaning it chooses. Under well-established principles of administrative law, when a statute does not specifically address a question, an agency must determine what construction of the statute would best effectuate Congress' direction in light of the purpose, structure, and intent of the Act. *See Chevron*, 467 U.S. at 845 (agency decision is invalid where "it appears from the statute or its legislative history that the [decision] is not one that Congress would have sanctioned").[14] The structure and purposes of Section 614 and subsequent congressional statements both demonstrate that all non-subscription portions of a digital television signal are entitled to carriage.

Under Section 614(b)(3), cable operators must carry the primary video and audio, certain information in the Vertical Blanking Interval (VBI), and any other "program-related" information. Paragraph 36 of the *Second Report and Order* is simply wrong when it concludes "that there is some video that is primary and some that is not." There were in fact ***no*** secondary video services that could be transmitted in the analog world.[15] Under the analog carriage rules, ***all*** of the video programming that a television viewer can receive over the air must be sent to viewers receiving the local broadcast signal over a cable system. The term "primary video" in

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[14] *See also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (reviewing court must ensure that agency's "construction is not contrary to clear congressional intent"); *Southern Co. v. FCC*, 293 F.3d 1338, 1343 (11th Cir. 2002) (even under the second step of the *Chevron* analysis, a reviewing court must "ask whether the agency's interpretation of congressional intent is reasonable").

[15] The types of secondary services that were permitted using the NTSC standard were teletext, audio on subcarriers, and other data services. *See* 47 C.F.R. §§ 73.646(b), 73.667(a). The analog technical rules do not contemplate any secondary *video* services.

this context can only refer to the broadcast programming service provided to viewers over ordinary television receivers, distinguishing it from secondary services that were not necessarily accessible to every viewer.[16] Paradoxically, the Commission has in a separate context — children's programming — concluded that multicast channels are part of a broadcaster's main program service to which children's programming obligations attach.[17] These two positions are plainly irreconcilable.

In the absence of congressional direction to the contrary, there is no justification for diverging from this mandatory carriage requirement in the digital environment. Services that a digital broadcaster offers for free over the air are functionally equivalent in all relevant respects to the video and audio portions of analog signals that Congress required to be carried. By contrast, Congress treated subscription services differently in analog, and they are not entitled to

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[16] The Commission is also wrong when it asserts in paragraph 36 that Section 336 (47 U.S.C. § 336) does not support carriage of multicasting. Section 336(a)(2), which was adopted as part of the 1996 Telecommunications Act, requires the Commission to permit digital television licensees to offer "ancillary and supplementary services" in addition to their regular digital television service. Section 336(b)(4) provides that "no ancillary or supplementary service shall have any rights to carriage under Section 614." The ancillary and supplementary services Congress ***excluded*** from mandatory carriage are different from traditional free broadcasting services. In recognition of that, the Commission, in the *Advanced Television Fifth Report and Order*, distinguished "ancillary and supplementary services" from free, over-the-air services provided over a digital television signal. Fifth Report and Order, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 ¶ 30 (1997) ("*Advanced Television Fifth Report and Order*"). Thus, Congress' subsequent exclusion of ancillary and supplementary services from carriage rights reflects the same choice Congress made in the Cable Act: services that are free to viewers must be carried on cable, while services that are provided on a subscription basis may be stripped by a cable operator.

[17] Report and Order and Further Notice of Proposed Rulemaking, *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943 ¶ 19 (2004) (requiring broadcasters that multicast to provide children's programming in addition to that required on the "main" channel).

carriage in digital because they are not universally available to over-the-air digital viewers.[18] Simply put, the only reasonable way to accommodate the purpose, structure, and intent of the statute is to apply the must carry obligations to the full digital broadcast.

The Commission must reconsider its statutory analysis of multicasting. In the Cable Act and the 1996 Telecommunications Act, Congress drew a clear line between universally available free program content that must be carried and subscription services that may be deleted by cable. The Commission is not free to draw a different line for digital carriage.

II. THE COMMISSION'S *TURNER* ANALYSIS IS ERRONEOUS.

The Commission should reconsider the *Second Report and Order* for the additional and wholly independent reason that it erred twice in how it used the *Turner* cases to dispose of both the transitional carriage and the multicasting issues. First, the Commission committed reversible error by misconstruing the applicable constitutional standard under the *Turner* cases. In those cases, the Supreme Court held that intermediate scrutiny applied, yet the Commission, by asking whether the must carry rules were "necessary," unlawfully converted the standard into strict scrutiny. Second, even if the Commission had used the right constitutional standard, the record before the Commission on the enormous additional capacity of cable systems meant that there could be no burden on speech that even rose to a possible issue under the *Turner* cases.

A. The Commission Misapplied the *Turner* Standard.

In determining that it could not impose either dual or multicast carriage unless it found that those rules were "necessary" to furthering important governmental interests, *see Second Report & Order* ¶¶ 15, 22, 24, 25, 37, 38, 41, the Commission converted the constitutional

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[18] The Commission has long distinguished pay services from broadcasting. *See* Report and Order, *Subscription Video*, 2 FCC Rcd 1001 ¶ 32 (1987), *aff'd sub nom. National Ass'n for Better Broad. v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

standard from intermediate to strict scrutiny. Based on this error, the Commission determined that the record did not show that "additional programming streams are ***essential*** to preserve the benefits of a free, over-the-air television system for viewers." *Id.* ¶ 38 (emphasis added). Under a standard that relies on either what is "essential" or "necessary," the Commission imposed an unlawfully higher standard than the one required by the Supreme Court in the *Turner* cases.

Under the first step of the controlling analysis in *United States v. O'Brien*, 391 U.S. 367 (1968), a court need only "determine [that] the regulation *materially advances* an important or substantial interest by redressing past harms or preventing future ones." *Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 356 (D.C. Cir. 2001) (emphasis added). "The requirement is met 'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *Ward v. Rock Against Racism*, 499 U.S. 781, 799 (1989)). The government's regulatory scheme "need not be the least restrictive or least intrusive means" of "serv[ing] the government's legitimate, content-neutral interests" under intermediate scrutiny. *Ward*, 499 U.S. at 798; *see also Hutchins v. District of Columbia*, 188 F.3d 531, 566 (D.C. Cir. 1999) (Rogers, J., concurring in part and dissenting in part) ("[I]ntermediate scrutiny . . . does not require the least restrictive means necessary to satisfy important governmental interests.").

Here, by contrast, the Commission used the wrong standard. The standard employed by the Commission is the one that would be relevant if must carry were content-based and strict scrutiny applied. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (reviewing content-based regulation under strict scrutiny to determine whether it "is *necessary* to serve a compelling state interest and is narrowly drawn to

achieve that end") (emphasis added). An error in the governing standard is reversible and the Commission must reconsider using the appropriate standard.[19]

B. The Growth in Cable Capacity Meant There Would Be No Unconstitutional Burdening of Speech by the Digital Carriage Rules.

Even if the Commission had used the right standard (which it did not, as explained in Part II.A above), the *Second Report and Order* must also be reconsidered because there is no evidence that digital carriage rules would burden cable's First Amendment rights. Indeed, the record conclusively demonstrated that the supposed "burden" of full carriage at the end of the transition would be no greater than twenty percent of the capacity used for carrying all analog signals when must carry went into effect — the burden upheld in *Turner*.

The Supreme Court in the first *Turner* case assumed that must carry might have a significant impact on the programming choices made by cable systems and the opportunity of cable programmers to obtain carriage.[20] The Court accordingly remanded for evidence of the burden on cable systems:

> the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters . . . unless we know

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[19] *See, e.g., Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976) (where reviewing court "cannot fairly discern that the agency has in fact applied the proper standard of review" in a proceeding implicating First Amendment interests, it must "remand the case for the Commission appropriately to apply the proper standard").

[20] Despite contentions by cable interests that analog must carry would violate the First Amendment because it compels cable operators to transmit speech not of their choosing, the Supreme Court rejected cable's "forced speech" arguments. *See Turner I*, 512 U.S. at 655 ("Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."). Although some cable industry comments in this proceeding appear to argue a forced speech theory against digital carriage rules, the only First Amendment claim that could be made against must carry rules is one based on the diversion of programming choices that must carry rules might cause.

> the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary."[21]

In the *First Report and Order*, the Commission, noting that "the impact of mandatory carriage on cable systems was relevant in *Turner*," sought "substantive information to determine cable system channel capacity."[22] In the *Second Report and Order*, the Commission concluded, with no assessment of the actual burden, that the record did not support impinging on the First Amendment interests of cable operators and programmers.[23] Remarkably, the Commission did not even attempt to measure that burden or examine the voluminous record that had been compiled on cable capacity. Instead, it assumed that both transitional and multicast carriage obligations would significantly foreclose cable programming choices and, therefore, burden cable's First Amendment interests. Given the importance that both the Supreme Court in *Turner* and the Commission in the *First Report and Order* placed on determining the actual effects of must carry rules, the Commission's failure to determine the extent to which cable First Amendment interests would be affected was, standing alone, arbitrary and capricious.

1. Transitional Carriage

Overwhelming record evidence shows that the capacity of the average cable system has grown so large that, combined with the benefits of digital compression technology, requiring cable systems to carry both digital and analog signals of local commercial television stations and all free programming streams of digital stations would not foreclose cable systems from carrying

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21 *Id.* at 668 (quoting *Ward*, 491 U.S. at 799). The Court recognized, moreover, that whatever impact must carry might then have on cable, "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium." *Turner I*, 512 U.S. at 639.

22 *First Report and Order* ¶ 115.

23 *Second Report & Order* ¶¶ 16-22, 38-40.

any other programs of their choice. Likewise, it would not diminish any cable programmer's opportunity to place its programs onto cable systems.

The fact of expanded cable capacity was conclusively established in a detailed analysis commissioned by NAB of the cable industry's own reports of its capacity,[24] yet the *Second Report and Order* did not even acknowledge the *Weiss Study*, much less grapple with its conclusions. The *Weiss Study* was critical in several respects.

First, the study showed that the actual use of cable capacity was minimal. In 1993, when must carry rules first went into effect, carriage of local commercial stations occupied **13.35 percent** of the capacity of the average cable system (a little more than one-third of the statutory cap).[25] By 1999, cable capacity used by local commercial stations fell by more than half to **6.25 percent (**less than one-fifth of the statutory cap).[26] These statistics include all of the local commercial signals carried on cable. Many of them, however, were carried voluntarily by cable systems pursuant to retransmission consent agreements and cannot be considered a "burden" on cable.[27] Thus, the actual "burden" of digital carriage rules on cable would be far less than even the negligible levels the *Weiss Study* found.

Second, the *Weiss Study*, prepared in 2001, relied on estimates of capacity at the end of 2003 that must be viewed as conservative because of the continuing growth of the capacity of the average cable system. Weiss estimated that **8.46 percent** of cable capacity (about one-fourth of

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24 Merrill Weiss Group, *Analysis of Cable Operator Responses to FCC Survey of Cable MSOs*, Attachment A to the Reply Comments of NAB/MSTV/ALTV, CS Docket No. 98-120 (filed Aug. 16, 2001) (hereinafter *Weiss Study*).

25 *Id.* at 14.

26 *Id*.

27 *Turner II*, 520 U.S. at 215.

the statutory cap) would be needed for transmission of local analog *and* digital commercial signals when all stations are transmitting two signals.[28]

Third, the study concluded that when analog broadcasting ceases altogether, carrying all local commercial signals will occupy only ***2.63 percent*** of cable capacity — less than one-tenth of the statutory cap.[29]

In light of the explosion in cable capacity and the extraordinary advances in technology, including digital compression, digital carriage (including transitional carriage) presents no unconstitutional "burden" on the First Amendment interests of cable systems.

2. Multicasting

The enormous growth in cable capacity established in the record is of even greater consequence in connection with multicast carriage. The cable systems, when responding to the Commission's survey, agreed that while cable carriage of ***one*** analog broadcast television signal required a full six MHz cable channel, ***two digital broadcast television signals*** could be carried on that same channel.[30] Thus, when only digital signals must be carried after the transition, cable systems will use only ***half*** the capacity to transmit local digital broadcast signals than they needed for the same stations' analog signals. And a broadcaster using its digital channel to air multiple standard definition streams occupies no more cable capacity, as a practical matter, than

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28 *Weiss Study* at 14.

29 *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734, 743 n.22 (D.D.C. 1995), *aff'd*, 520 U.S. 180 (1997) ("if the burden to the cable industry were much smaller, then the First Amendment would not even be implicated").

30 *Weiss Study* at 12.

a broadcaster airing a single high-definition programming stream, which cable operators will be ***required*** to carry.[31] The *Second Report and Order* does not acknowledge this critical fact.[32]

Cable argues that the bits that would be used for transmission of multicast programs could be used for other purposes, even if the amount of those bits would vary due to changing amounts needed for the "main" program service. Even assuming that, as a practical matter, cable operators would have any use for the bits they could "harvest" from time to time from a local broadcast signal, the capacity that would be used to carry multicast programming amounts to a mere fraction of a fraction of a cable channel. Devoting it to broadcast signals would not preclude cable operators from *any* programming choices. Chairman Martin agrees: "The burden on cable of a requirement to carry these multicast channels, however, actually would be far less than it was in the analog world."[33] While, to be sure, carriage of any signal or portion of a signal, as a theoretical matter, precludes the use of some capacity for other purposes, the real-world impact of digital carriage rules on cable operators and programmers is negligible. As the *Weiss Study* showed, from 1999 to 2003, cable program capacity ***increased 83.5 percent***,[34] and further increases in capacity have and will continue to come on line.

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The *Second Report and Order* purports to engage in a constitutional analysis of dual and multicasting carriage without ever examining an issue that the Supreme Court and the

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31 *See* "A Constitutional Analysis of the 'Primary Video' Obligation: A Response to Professor Tribe," attached to Ex parte submission of NAB, at 5-6 (filed Aug. 5, 2002).

32 The Commission's suggestion in paragraph 39 of the *Second Report and Order* that "mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system" is simply incorrect.

33 *Second Report and Order*, Martin Separate Statement.

34 *Weiss Study* at 27.

Commission both deemed crucial — the actual "burden" that the proposed carriage requirements would have on cable.[35] Instead, the Commission simply assumed that a significant burden existed. *See, e.g., Second Report and Order* ¶¶ 15, 22, 25, 40, 41 & n.155. If the Commission had looked at the evidence it itself collected, the only conclusion it could have reached is that neither transitional carriage nor multicast carriage would have any material impact on cable speech rights. Because the Commission's decision not to require transitional or multicast carriage rested on its unsupported assumption that those rules would violate the First Amendment, and was compounded by its mistaken application of strict scrutiny, the Commission must reconsider the decisions it reached in the *Second Report and Order.*

III. THE COMMISSION ENTIRELY IGNORED RECORD EVIDENCE THAT MANDATORY CARRIAGE OF MULTICASTING WOULD FURTHER CONGRESS' EXPRESS POLICY OBJECTIVES.

A final and wholly independent reason the Commission should reconsider is that it misunderstood Congress' objectives in the Cable Act and ignored record evidence that digital carriage rules would help achieve them. The Commission failed to even consider the unusually detailed findings in the Cable Act that explain Congress' goals and interests, and it also did not take into account the purposes the Commission itself has identified as supporting the transition to digital television. While the Commission mentioned the two important government interests that sustained must carry in the *Turner* decisions — "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a

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[35] *First Report and Order* ¶ 12 (stating that dual carriage issue "presents" "constitutional questions" and that "further information" on "cable system channel capacity" is needed to help resolve those questions); *Turner I*, 512 U.S. at 668 ("unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress substantially more speech than . . . necessary") (internal quotation marks omitted).

multiplicity of sources"[36] — the Commission failed to address how the record evidence in this proceeding related to those interests. Without reconsideration, the Commission would be acting in an arbitrary and capricious fashion because it "entirely fail[ed] to consider an important aspect of the problem" before it. *State Farm*, 463 U.S. at 43.[37]

A. The Commission Failed To Consider How Digital Carriage Would Advance the Digital Transition.

The Commission entirely ignored the substantial governmental interests in the digital transition. The purpose of the transition, the Commission has said, is "to preserve and *improve* existing broadcast service;"[38] "[o]nly if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest."[39] If some broadcasters' digital signals are not carried on cable systems during the transition, the owners of digital receivers who subscribe to cable will not receive those stations' DTV signals. Not only will those stations have less ability to develop attractive digital programming — the situation that the Court in *Turner* agreed Congress was justified in predicting — but they will still have to shoulder the substantial costs of building and

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[36] *Second Report and Order* ¶¶ 16, 19 (quoting *Turner I*, 512 U.S. at 662). The Commission discounted a third interest — preventing anticompetitive cable practices — because Justice Breyer did not join with the *Turner* plurality on that point. Congress, however, believed that cable systems would behave anticompetitively, *see, e.g.*, 47 U.S.C. § 521 note (Cable Act § 2(a)(15)), and the Commission was wrong in setting aside that issue.

[37] Moreover, any aspect of a problem that Congress expressly identifies is, "by definition," "an important aspect" of that problem, "as it is for Congress in the first instance to define the appropriate scope of an agency's mission." *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

[38] Tentative Decision and Further Notice of Inquiry, *Advanced Television Systems and their Impact on the Existing Television Broadcast Service*, 3 FCC Rcd 6520 ¶ 136 (1988) (quoted in Notice of Proposed Rulemaking, *Advanced Television Systems and their Impact on the Existing Television Broadcast Service*, 6 FCC Rcd 7024 ¶ 5 (1991)). Advancing the digital transition will also clear spectrum for the provision of vital public safety services. Providing improved public safety services constitutes a substantial, if not compelling, governmental interest.

[39] *Advanced Television Fifth Report and Order* ¶ 5.

operating digital facilities with diminished opportunities to recoup that investment. The private decision of a cable operator to benefit one station by carrying its digital signal or its multicast programming, and to harm another station by denying carriage, results in exactly the threat to the Commission's allocation of station licenses that Congress adopted must carry to prevent. *See* H. REP. NO. 102-68, at 52 (1992).

B. The Commission Ignored the Record on the Importance of Digital Carriage to Local Broadcast Service.

The Commission determined that carriage of local digital signals was not "*necessary*" to preserve the interests of over-the-air viewers because all stations are required to construct digital facilities. *Second Report and Order* ¶¶ 18, 38 (emphasis added). But the survival of broadcasting is not the issue, for "Congress was under no illusion that there would be a complete disappearance of broadcast television nationwide in the absence of must-carry." *Turner II*, 520 U.S. at 191. Instead, must carry was adopted because Congress reasonably concluded that "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 192 (quoting *Turner I*, 512 U.S. at 666). The Court pointed to the conclusion in the House Report that the lack of must carry "will result in a weakening of the over-the-air television industry and a reduction in competition." *Id*. (quoting H. REP. NO. 102-68, at 51 (1992)).[40] By focusing not on strengthening the quality and quantity of over-the-air service, but only on whether digital carriage was "essential" to station survival, the Commission fundamentally misunderstood the issue.

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[40] Justice Breyer agreed that, without carriage rules, "cable systems would likely carry significantly fewer over-the-air stations, . . . that station revenues would therefore decline, . . . and that the quality of over-the-air programming on such stations would almost inevitably suffer." *Turner II*, 520 U.S. at 228 (Breyer, J., concurring in part).

The Commission refused to consider the unrefuted record evidence that lack of carriage of broadcasters' multicasting streams would imperil the financial health of local broadcasters, particularly those located in small and medium markets. As Congress noted in the 1992 Cable Act, "[t]here is a substantial governmental interest in ensuring [the] continuation" of the "local origination of programming." 47 U.S.C. § 521 note (Cable Act § 2(a)(10)).[41]

As the Commission noted in its *2002 Biennial Ownership Review Order*, "the ability of local stations to compete successfully in the delivered video market [has been] meaningfully (and negatively) affected in mid-sized and smaller markets."[42] The record here similarly suggests that particularly in these small- to medium-sized markets, the threat posed by cable companies' failure to carry multicasting streams is real, and it will have a major impact on broadcasters' ability to sustain the costs associated with the DTV transition:

- Local broadcasters have had difficulty in ensuring carriage of their multicasting streams. Broadcasters need cable carriage of their multiple programming streams to develop DTV as a vibrant service. NBC Affiliates Special Factual Submission, CS Docket No. 98-120, at 14 (filed Jan. 8, 2004).

- Small- and medium-sized broadcasters are particularly challenged in today's environment, in large measure because the cost of the digital transition is proportionally far greater for those broadcasters. Multicasting permits broadcasters to spread the costs of providing local news and information over more revenue streams. *Id.* at 15, 17.

- Because of the growing predominance of advertising on cable, it has become "economically dangerous" for broadcasters to continue to offer a single-stream product. Declaration of Ed Trimble, Midwest Television, Inc., ¶ 11, attached to CBS Affiliates Special Factual Submission, CS Docket No. 98-120 (filed Jan. 13, 2004). By splitting their signals, broadcasters will be better able to compete with cable operators for advertising dollars.

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41 *See also* Report and Order and Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 ¶¶ 8, 73-79 (2003) (hereinafter *2002 Biennial Ownership Review Order*), *aff'd in part and remanded in part sub nom. Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

42 *2002 Biennial Ownership Review Order* ¶ 201.

- Multicasting is needed to help local broadcasters maintain their local news focus. Because many MSOs have their own local news channels, they are unlikely to carry a competitive multicasting 24/7 news stream from a broadcaster. Declaration of Craig Dubow, Gannett Broadcasting Co., ¶ 9, attached to NBC Affiliates Special Factual Submission, CS Docket No. 98-120 (filed Jan. 8, 2004).

In the face of this unrefuted evidence, the Commission should not have been satisfied by the cable operators' representations that they are "voluntarily carrying the multiple streams of programming of some broadcast stations." *Second Report & Order* ¶ 38. Such an approach exacerbates the very problem that the Cable Act was intended to address — namely, giving cable operators the power to choose which broadcast local signals should thrive and which should fail.[43]

C. The Commission Ignored Evidence of the Benefits That Multicast Carriage Would Bring to the Public.

With respect to the governmental interest in fostering the "widespread dissemination of information from a multiplicity of sources," the *Second Report and Order* found that transitional and multicast carriage was not necessary to advance this interest, largely because "it would not result in additional sources of programming" (¶ 19), and "[a]dding additional channels of the same broadcasters would not enhance source diversity" (¶ 39). The Commission's narrow reading fundamentally misunderstood the objectives Congress sought to achieve in the Cable Act.

The Commission failed to appreciate that, apart from local access and PEG channels, broadcast signals are the only channels on a cable system that are not under the control of a single cable operator. Congress found that a "primary objective and benefit of our Nation's

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[43] *See* 47 U.S.C. § 521 note (Cable Act §§ 2(a)(5), (15) - (16), (b)(1), (3), (5)).

system of regulation of television broadcasting is the local origination of programming,"[44] and that "[b]roadcast stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[45] The record shows that increasing the opportunity for local stations to provide new and innovative digital services directly advances these congressional goals. *See infra* at 22-24. Multicast carriage, in particular, will provide more information sources that are not under the control of a cable operator and, thus, add to the information mix available to both cable subscribers and over-the-air viewers alike.

The *Second Report and Order* overlooks entirely the record evidence demonstrating the substantial *benefits* that such carriage would bring in terms of providing more diverse and innovative programming to both over-the-air and cable customers. The record in this proceeding is, as Chairman Martin noted in his separate statement, "replete with examples of the free programming services broadcasters want to provide and expand." More evidence of the importance of multicasting to broadcasting will continue to accumulate as the digital transition moves forward.[46] Broadcasters will provide the Commission with additional evidence of the benefits the public will receive from multicasting by local digital television stations, benefits that will be lost if carriage of those signals to consumers is not assured.

The record already demonstrates that local broadcasters plan to use digital multicasting streams to provide a wide variety of programming that is currently not available either over the air or on most cable systems. The principal focus of this planned programming is local coverage

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44 *Id.* (Cable Act § 2(a)(10)).

45 *Id.* (Cable Act § 2(a)(11)).

46 *See, e.g.*, Allison Romano, "Stations Tap a Digital Revenue Stream," *Broadcasting & Cable*, Apr. 18, 2005, at 16 (describing local broadcasters' multicasting plans).

targeting specific geographic areas and communities of interest. This is exactly the kind of programming Congress and the Commission seek to promote. *See* 47 U.S.C. § 521 note (Cable Act § 2(a)(10) (noting "substantial governmental interest in ensuring . . . continuation" of "local origination of programming"); *2002 Biennial Ownership Review Order* ¶ 78 (using "the selection of programming responsive to local needs and interests, and local news quantity and quality" as the benchmarks for assessing a broadcaster's commitment to fulfilling the Commission's localism goals).

The Commission did not even mention the mountain of evidence demonstrating plans to provide local news and information on multicasting streams:[47]

- NBC affiliates want to multicast weather channels, as well as local alerts and traffic and travel-related information. NBC Affiliates Special Factual Submission, CS Docket No. 98-120, at 8 (filed Jan. 8, 2004); Ex parte submission of NBC Affiliates, CS Docket No. 98-120 (filed Oct. 28, 2004); Ex parte submission of Hearst-Argyle Television, Inc., CS Docket No. 98-120 (filed Mar. 16, 2004).

- CBS and NBC affiliates are planning local news channels that would offer local news and extended coverage of local events, local sports and events channels, and AMBER alerts for missing children. CBS Affiliates Special Factual Submission, CS Docket No. 98-120, at 8 (filed Jan. 13, 2004); NBC Affiliates Special Factual Submission, CS Docket No. 98-120, at 8-9 (filed Jan. 8, 2004). WRAL-DT, the CBS affiliate in Raleigh, North Carolina, has been offering its viewers high-definition programming *and* a full-time local news service on its digital channel for more than three years. Ex parte submission of Capitol Broadcasting Corp., CS Docket No. 98-120 (filed Jan. 27, 2005). Similarly, KTVB-DT, the NBC affiliate in Boise, Idaho, offers 24-hour local news on a multicast channel. Declaration of Jack Sander, Belo Corp., ¶ 3, attached to NBC Affiliates Special Factual Submission, CS Docket No. 98-120 (filed Jan. 8, 2004).

- The New York Times Broadcasting Group is exploring ways to use multicasting to provide focused local news to viewers in particular towns and communities. NBC Affiliates Special Factual Submission, CS Docket No. 98-120, at 9-10 (filed Jan. 8, 2004); CBS Affiliates Special Factual Submission, CS Docket No. 98-120, at 7 (filed Jan. 13, 2004); *see also* Comments of NAB/MSTV/ALTV, CS Docket 98-120, at 40 (filed June 11, 2001) (describing how, in the event of an emergency weather event, multicasting

[47] Further, the Commission gave no weight to ABC and its affiliates use of multicasting to deliver an innovative national news service — *ABC News Now*. Ex parte submission of ABC, Inc., CS Docket No. 98-120 (filed Nov. 20, 2003).

could be used to alert the viewing audience on the first channel and invite them to more detailed coverage on a second channel). These proposals are in line with the recommendations of the Media Security & Reliability Council. *See* Comprehensive Best Practices Recommendation, at 11 (Mar. 2, 2004) ("The existing tool set of digital television . . . should be leveraged in the development of new emergency notification standards and practices. Many of the existing capabilities are readily applicable, including but not limited to multiple video and audio channels, uniform channel designation, closed captioning and the ACAP middleware standard.").

- The CBS affiliate in Toledo, Ohio, is exploring opportunities for multicasting state legislative debates, mayoral press conferences, city council hearings, and school committee hearings. CBS Affiliates Special Factual Submission, CS Docket No. 98-120, at 6 (filed Jan. 13, 2004).

- The ABC affiliate in Fresno, California aired full screen election results on its second channel during the gubernatorial recall election. Ex parte submission of ABC Owned Television Station Group, CS Docket No. 98-120 (filed Jan. 21, 2004).

Likewise, the Commission entirely overlooked record evidence that multicasting would be used to provide information to non-English speaking communities in particular media markets — including markets where non-English speakers are relatively small — as well as to other minority communities:

- Liberty Broadcasting is looking to use multicasting in Harlingen, Texas to provide language training, employment updates, and immigration information in Spanish. Declaration of Jim Keelor, Liberty Corp., ¶ 4 ("Keelor Decl."), attached to NBC Affiliates Special Factual Submission, CS Docket No. 98-120 (filed Jan. 8, 2004).

- Multicasting carriage would enable the nation's 23 minority-owned broadcasters to develop multicultural programs and program channels, thereby overcoming the "gatekeeper" effect exercised by cable operators. Ex parte submission of Minority Media & Telecommunications Council, CS Docket No. 98-120, at 2 (filed Jan. 26, 2004).

- Most networks devoted to the African-American community are run by cable programmers and are national in scope (BET, TV One). Multicasting enables programming that is both *local* in orientation and focused on the African-American community. Ex parte submission of Black Education Network, CS Docket No. 98-120 (filed Jan. 28, 2004).

Again, the Commission did not even acknowledge record evidence that parties are looking to multicasting as a vehicle for providing additional children's and educational programming:

- DIC Entertainment has announced plans for a children's digital TV service, but explained that such a service is infeasible in the absence of mandatory multicasting carriage. Ex parte submission of DIC Entertainment, Inc., CS Docket No. 98-120 (filed Feb. 3, 2005).

- Liberty Broadcasting is looking to partner with local colleges to provide telecourses over multicast channels. Keelor Decl. ¶ 7, attached to NBC Affiliates Special Factual Submission, CS Docket No. 98-120 (filed Jan. 8, 2004).

- The National Medical Association wants to provide programming concerning minority health issues on multicasting streams. Ex parte submission of National Medical Association, CS Docket No. 98-120 (filed Mar. 25, 2004).

In addition to making plans for these innovative types of programming, local broadcasters also intend to use multicasting streams to bring emerging networks, such as the United Paramount Network ("UPN") and the Warner Brothers ("WB") Network, to small and medium markets where they have yet to be available over the air. Just as analog must carry made possible the creation of emerging networks in the first place,[48] the evidence shows that digital carriage of multicasting streams would allow the reach of these networks to be expanded.[49] These efforts will help bring greater diversity in programming *sources* to the viewers in these underserved markets in addition to the additional *types* of programs that multicasting will make possible.[50]

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48 *See* Initial Comments of National Association of Broadcasters, CS Docket No. 98-120, at 20-22 & n.53 (filed Oct. 13, 1998); *see also id.*, Appendix B (Statement of Dean Valentine ¶ 3) (describing importance of must-carry to growth of UPN).

49 CBS Affiliates Special Factual Submission, CS Docket No. 98-120, at 7 (filed Jan. 13, 2004); NBC Affiliates Special Factual Submission, CS Docket No. 98-120, at 9 (filed Jan. 8, 2004).

50 The *Second Report and Order* accepts the cable companies' argument that mandatory multicasting carriage should be rejected because broadcasters would have greater incentives to improve their programming in the absence of such carriage. (¶¶ 40-41) This is the same argument, however, that the cable companies made — and that Congress specifically rejected — in the analog must carry setting. *See* 47 U.S.C. § 521 note (Cable Act § 2(a)(15)) (finding cable operators have an "economic incentive" to "refuse to carry new signals" from broadcasters, and that absent a must-carry requirement, "additional local broadcast signals will be deleted, repositioned, or not carried").

Carriage of the full mix of digital programming available from local stations during the transition and afterwards will further the interests that Congress and the Commission have found support must carry and the digital transition. If digital carriage rules must satisfy intermediate scrutiny, that is ample justification for them, and the Commission must reconsider its decision that was based on an incorrect view of the relevant standard.

CONCLUSION

For the foregoing reasons, the Commission should reconsider the *Second Report and Order* and adopt rules requiring cable operators to carry both analog and digital signals and all non-subscription portions of local commercial digital broadcast signals.

Respectfully submitted,

ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.
P.O. Box 9897
4100 Wisconsin Avenue, NW
Washington, D.C. 20016
(202) 966-1956

David L. Donovan

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street NW
Washington, D.C. 20036
(202) 429-5430

Marsha J. MacBride
Jerianne Timmerman

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